

APPEAL NO. 990181

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 4, 1999, a hearing was held. She (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 12th compensable quarter. Appellant (carrier) asserts that claimant did not attempt in good faith to find work, citing Texas Workers' Compensation Commission Appeal No. 971644, decided October 6, 1997. The appeals file does not contain a reply by claimant.

DECISION

We affirm.

Claimant worked for (employer) when, he testified, on _____, he lifted a heavy die and hurt his low back. He had spinal surgery in July 1997 and has recently been approved for a 360E fusion, but no date of surgery has been set. The parties stipulated that claimant has a 15% impairment rating (IR), that he commuted no benefits, that the filing period for the quarter in question began on July 15, 1998, that claimant has some ability to work, and that claimant earned no wages during the filing period.

Claimant testified to 20 job searches, which included six applications with various businesses, three visits to the Texas Rehabilitation Commission about job leads, and 11 visits to the Texas Workforce Commission (TWC) to search for positions open. Listed visits to the above began on July 15, 1998, and ended on September 17, 1998. In addition, claimant testified that he cannot drive too far in looking for a job because of his back and also said that his six applications do not show all his contacts with businesses because some places contacted would not give him an application.

Claimant also testified that he considers it to be "his job" to look for work until he finds a job. As stated by his counsel, claimant has little education and has worked all his past life as a laborer. Claimant also said that he would much prefer finding a job to not working and all not working entails. While claimant only listed 20 contacts in regard to trying to find work, he testified that he "goes out" five times a week to see about work, adding that some who would not give him an application took that position after asking about his back or his workers' compensation claim.

Carrier stressed that when its investigator called the six listed businesses about applications, she received no confirmations. Claimant stated that he then returned to all six and obtained confirmation that applications had been made. Carrier's investigator then agreed that three, and perhaps four, did indicate that applications had been made (at least one was found and at least one had been "dumped").

There was also a question as to whether claimant signed in at the TWC each time he went, since not all 11 visits were shown on that agency's records. However, there was also evidence that claimant was so well known there that he could enter and go right to a

computer listing without signing in each time. Claimant also testified that he continued to go to the TWC after he turned in his application for SIBS.

The hearing officer queried claimant about each listed contact. For instance, claimant said that his number eight contact involved getting the phone number for the postal service in (city), and he then contacted it. On his next visit, he checked the computer about the local postal service to obtain information about other postal jobs. (He did not obtain a postal job.) The hearing officer, in her Statement of Evidence, says that she believed claimant and considered the evidence credible that a good faith effort was made to find work. See Sections 408.142 and 408.143 which list four statutory requirements for SIBS: an IR of 15% or more, earning less than 80% of the preinjury wage as a direct result, no commutation of benefits, and whether or not there has been a good faith attempt to find work commensurate with the ability to work. Neither section imposes any requirement for a number of job contacts as a prerequisite to a finding of good faith, and the Appeals Panel has not imposed such a number. See Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, which said that the number of contacts may be one factor in determining the state of mind and honesty of purpose that denote good faith, but also said that no specific number of contacts equated to good faith.

Carrier states that the claimant "restricted his search to only ten percent" of the days in the filing period and cites Appeal No. 971644, *supra*. The cited opinion only affirms a hearing officer's determination of no award of SIBS in a case that involved an allegation of inability to work with a job search started well after the filing period began. The hearing officer concluded that no SIBS were due even though claimant was said to have begun exhibiting good faith after two-thirds of the filing period was over because good faith was not shown over the whole period. Appeal No. 971644 affirmed and commented that "we have held that the good faith search requirement normally covers the entire filing period in issue." It cited Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996, and Texas Workers' Compensation Commission Appeal No. 960999, decided July 10, 1996. Neither cited opinion involved an inability to do any work at all. The first cited opinion reversed an award of SIBS to a claimant who made one application that occurred over two months into the filing period and did nothing else but look through Sunday papers with no other inquiry. It rendered that good faith was not shown. The second case cited, Appeal No. 960999, dealt with a claimant who had a light-duty job and chose to leave it to "go to college full time to earn a degree and work part-time" This case acknowledged that it was reversing because the underemployment was based on the voluntary student status rather than being a result of the impairment, but it went on to say that another finding of fact would also disqualify claimant. It noted that a finding found good faith in nine weeks but not in five other weeks, and the Appeals Panel opinion then noted that SIBS is provided for a whole quarter, not a fraction "and the requirements span the whole period, not just a portion of the period"

Even if the language in Appeal No. 960999, *supra*, about good faith was necessary to deciding that case, the language in point was directed at the "requirements" for SIBS, which include an attempt in good faith and underemployment being a direct result of the impairment—Appeal No. 960999 did not define the "requirements" it referenced to include "search" as Appeal No. 971644, *supra*, includes in its comment. (As stated, the statutory

requirements are for an attempt in good faith and unemployment to be a direct result of the impairment.) There is no "requirement" in Sections 408.142 and 408.143 that a certain number of contacts have to be made, and there is no "requirement" that some portion of that unspecified number (see Appeal No. 950364, *supra*) must be shown to have occurred in a particular week or in a particular month. Nevertheless, a hearing officer must consider the entire filing period to find good faith (Appeal No. 960999, *supra*) and may consider periods of inactivity in determining whether there is or is not good faith. In addition, if the inactivity becomes overwhelming, such as in Appeal No. 960964, *supra*, where only one contact was made in the entire filing period with virtually nothing else shown indicative of good faith, then a finding of good faith will probably be reversed, as shown, as against the great weight and preponderance of the evidence. We do not find Appeal No. 971644, *supra*, to require overturning the decision in the case under review.

In the case under review, the hearing officer stated that she found the claimant credible. See Section 410.165. While the evidence was conflicting as to some contacts made, the hearing officer indicates she believed claimant, and it is her duty to resolve conflicts. The evidence showed 20 contacts listed and claimant's testimony specifically mentioned a postal service contact not listed, and he said that there were other contacts not listed when he was refused an application. In addition, while carrier states claimant quit searching too soon in the last month of the filing period, claimant testified that he kept contacting TWC after he submitted his application for SIBS, which the hearing officer could credit and could believe was still in the same filing period. (Claimants are told to file no later than 15 days after receiving the form from the carrier with payment for the third month of the prior quarter—see Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (b) and (c) (Rule 130.104(b) and (c)).)

Finding that the evidence sufficiently supports the determination that claimant attempted in good faith to find work commensurate with his ability, we affirm that SIBS are payable for the 12th compensable quarter. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge